INDEX

	Page
TABLE OF AUTHORITIES	ii
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF FACTS	2
ARGUMENT AND CITATION OF AUTHORITY	4
1. It was not the legislative intent to make arbitration inapplicable in Miller Act cases	4
2. The decision of the Court of Appeals is in harmony with previous decisions of this court	7
3. The decision of the Court of Appeals is in harmony with decisions of other Circuit Courts and no conflict exists	10
4. A Miller Act case is peculiarly suited for arbitration	10
5. The contract in question evidences a transaction involving commerce	11
6. Petitioner's contention that the contracts were subject to rescission is without merit	12
CONCLUSION	13

TABLE OF AUTHORITIES

Page

Agostini Bros. Building Corporation v. *United States*, 4th Cir., 142 F. 2d 854 10

Bernhardt v. *Polygraphic Company of America*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199 8

Boyd v. *Grand Trunk Western Railroad Company*, 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55 9

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 8

Goldberg, et al. v. *Five Boro Construction Corp.*, 291 F. 2d 371 12

Metro Industrial Painting Corp., et al. v. *Terminal Construction Company, Inc.*, 2nd Cir., 287 F. 2d 382 12

Mitchell v. *C. W. Vollmer & Company*, 349 U. S. 427, 99 L. Ed. 1196 12

Mitchell v. *Lublin, McGaughy & Associates, et al.*, 358 U. S. 207, 3 L. Ed. 2d 248 12

Pearson v. *George*, 209 Ga. 938, 945 (77 S. E. 2d 1) 13

Pope v. *Atlantic Coastline Railroad Company*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094 9

Powell v. *United States Cartridge Company*, 339 U. S. 497, 94 L. Ed. 1017 12

Robert Lawrence Company v. *Devonshire Fabrics, Inc.*, 2nd Cir., 271 F. 2d 402 13

TABLE OF AUTHORITIES (Continued)

	Page
Rosenberg v. *United States*, 346 U. S. 371, 73 S. Ct. 1152, 97 L. Ed. 1607, 1619	7
Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 2nd Cir., 70 F. 2d 297	8
Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U. S. 499, 55 S. Ct. 313, 79 L. Ed. 583	7
United States v. *Aetna Casualty and Surety Company*, 2d Cir., 297 F. 2d 665	6
United States v. *Al Con Development Corporation*, 4th Cir., 271 F. 2d 904	10
United States v. *Borden Company*, 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181, 190	7
United States v. *Bregman Construction Corporation*, 6th Cir., 256 F. 2d 851	10
Wilko v. *Swan*, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168	9

OTHER AUTHORITIES CITED

	Page
12 *Am. Jur.* 1029, (Contracts), Section 447	13
12 *Am. Jur.* 1030, (Contracts), Section 449	13
45 USCA 55 (Federal Employers Liability Act)	9
Act of August 13, 1894, Ch. 280, 28 Stat. 278 (Heard Act)	4
Hearings before the Subcommittee on the Judiciary, 74th Cong., 1st Sess., Serial 4, Mar. 8, 22, Apr. 26; May 3, 1935, pp. 47-48	5
40 USCA 270 a-d, (Miller Act)	2
15 USCA 77n, (Securities Act of 1933)	10
9 USCA 1-3, (United States Arbitration Act)	2
3 *Williston*, (Contracts), Section 688	13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. 401

UNITED STATES OF AMERICA,
for the use of H. W. MOSELEY, d/b/a MOSELEY PLUMBING AND HEATING COMPANY,
Petitioner

V.

ELECTRONIC & MISSILE FACILITIES, INC., formerly FIVE BORO CONSTRUCTION CORPORATION, and CONTINENTAL CASUALTY COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been published, but is contained in the record at pages 208-222.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief.

QUESTIONS PRESENTED

Basically, two questions are presented: (1) Do the venue and jurisdictional provisions of the Miller Act (40 USCA 270 a-d) repeal by implication the United States Arbitration Act (9 USCA 1-3) with respect to Miller Act transactions; (2) Do petitioner's other contentions raise any substantial federal issue which would justify the grant of certiorari.

STATUTES INVOLVED

The pertinent provisions of the Miller Act (40 USCA 270 b) are quoted by petitioner at page 5 of his brief, and the applicable portions of the United States Arbitration Act (9 USCA Sections 1, 2 and 3) are set out as an appendix to petitioner's brief at pages 50-51.

STATEMENT OF FACTS

The original complaint in this case was brought under the Miller Act, Title 40, USCA 270 (a-d). The facts are that the respondent, Electronic & Missile Facilities, Inc., formerly Five Boro Construction Corporation, bonded by respondent, Continental Casualty Company, (both of whom will be referred to as "respondent"), was prime contractor with the United States Government for the construction of Nike Hercules Facilities at Robins Air Force Base and Turner Air Force Base within the Middle District of Georgia. Petitioner, as a subcontractor of respondent, assumed under two written

subcontracts a certain portion of the work, including the plumbing, heating and air conditioning. (R. 196)

The complaint which sought to recover approximately One Hundred Twenty-five Thousand ($125,000.00) Dollars (in addition to approximately $405,000.00 which had already been paid) was brought in six counts for breach of two written subcontracts attached to the complaint as exhibits. One subcontract covers the work to be performed at Robins Air Force Base and the other subcontract covers the work to be performed at Turner Air Force Base. The provisions of the two subcontracts are identical, except as to amounts and location, and for the purpose of this brief may be treated as a single instrument. (R. 196, footnote 1)

The various counts of the complaint each alleged that petitioner had fully completed his work and that respondent had instituted arbitration proceedings under the terms of the subcontracts which would require petitioner to arbitrate the dispute over sums alleged to be due petitioner under the subcontracts; and that such arbitration should be restrained by the court in order to allow petitioner to prosecute his claim within the Middle District of Georgia. In the alternative, petitioner sought to rescind the contracts for fraud.

Respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted, and in lieu thereof, moved to stay the proceedings until an arbitration could be had in accordance with the express terms and conditions of the subcontracts sued upon. (R. 120-122)

The case came on for a hearing upon the motion filed by respondent and based upon the pleadings and the

depositions and affidavits on file in the case such motion was overruled and denied by the District Court on each and every ground, and a restraining order preventing arbitration previously granted was continued in full force and effect. (R. 196-201)

On appeal the United States Court of Appeals for the Fifth Circuit reversed the order of the trial court and remanded the case to the District Court with direction that the proceedings be stayed for the purpose of arbitration in accordance with the terms of the subcontracts sued upon. (R. 208-222)

ARGUMENT AND CITATION OF AUTHORITY

1.

It was not the legislative intent to make arbitration inapplicable in Miller Act cases.

The bold contention of petitioner for certiorari is that no Miller Act suit can be arbitrated and that as to Miller Act suits, the United States Arbitration Act has been impliedly repealed. There is nothing in the two Acts themselves which justifies this conclusion and if it is to be drawn it must be found in their legislative history.

The Miller Act came into being in 1935 as a modification of the Heard Act. The Heard Act [1] was originally enacted by Congress to protect the United States Government from defaulting contractors and at the same time to protect suppliers of labor and material from the same eventuality. It is evident from the provisions of the Heard Act that the primary purpose of the Act was the protection of the United States Government. Since the government was compelled to accept the lowest bid,

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[1] Act of August 13, 1894, Ch. 280, 28 Stat. 278.

it had no way of selecting only solvent contractors and as a consequence it had no assurance that the contract would be completed, hence, the provisions of the Heard Act requiring a bond in favor of the government conditioned on faithful performance. Collateral to such provision was the further provision that in the event of default, the government would bring one suit and unpaid suppliers of labor and material might intervene and recover pro rata their unpaid bills *after* the government had been paid. Since there was but one suit, and for the convenience of everybody, the Heard Act provided that the one suit be brought in the district where the work was performed.

The Heard Act turned out to be clumsy and unwieldly for the reason that unpaid suppliers had to wait, sometimes years, until the government brought its suit, and thus Congress in 1935 enacted the Miller Act. Only two substantial changes were made, the first being the provision that two bonds would be required, one in favor of the government and the other in favor of subcontractors and materialmen; and, second, the provision whereby unpaid materialmen and laborers might bring a separate suit if they were not paid within ninety days from the date they supplied the last labor and material. In the course of the House Committee hearings, [2] the surety companies argued that the single suit system should be continued so that they might be protected from paying out more than the limits of their bonds, since with separate suits being maintained in many jurisdictions they would be hard pressed to determine the

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[2] Bonds of Contractors on Public Works, Hearings before the Subcommittee on the Judiciary, 74th Cong., 1st Sess., Serial 4, Mar. 8, 22, Apr. 26, May 3, 1935, pp. 47-48.

status of payments in relation to the total amount of their bonds. To prevent this, the Miller Act as finally enacted retained the former provision of the Heard Act that all actions would be brought in a district where the work was performed, and as pointed out by the Second Circuit Court of Appeals in the case of *United States* v. *Aetna Casualty and Surety Company*, 2d Cir., 297 F. 2d 665, the venue or jurisdictional section of the Miller Act retained "scant utility save as a convenience to the defendants."

We, therefore, do not dispute the fact that the Miller Act, as contended by petitioner, is highly remedial in nature and entitled to a liberal constructon and application. It appears, however, that petitioner has obviously confused the relative position occupied by a supplier of labor or material operating without any contract with the prime contractor, with that of a subcontractor operating under a written subcontract entered into with the prime contractor. In the former case, a supplier of labor or material must rely on the provisions of the Miller Act to furnish him the same protection ordinarily furnished by the lien laws of the various states. The subcontractor, on the other hand, while nevertheless protected by the bond of the prime contractor, enjoys a direct contractural relationship with the prime contractor. As to such a subcontractor, therefore, there appears to be no valid reason to prevent him from entering into a subcontract with the prime contractor providing that disputes between them over amounts of money due shall be subject to arbitration.

Clearly, in enacting the United States Arbitration Act, the Congress intended and did announce a federal

policy in favor of arbitration of disputes, and to hold that the present case is not subject to arbitration would clearly amount to an implied repeal of the Arbitration Act, and no such implied repeal can be shown or inferred by the terms of the Miller Act or by its legislative history. Moreover the opinion of the Court of Appeals in holding the Arbitration Act applicable in this case is consistent with numerous decisions of this court holding that, "It is a cardinal principle of construction that repeals by implication are not favored. . . . The intention of the legislature to repeal 'must be clear and manifest.' . . . It is not sufficient . . . 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old.'" *Rosenberg* v. *United States*, 346 U. S. 371, 73 S. Ct. 1152, 97 L. Ed. 1607, 1619; citing *United States* v. *Borden Company*, 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181, 190.

2.

The decision of the Court of Appeals is in harmony with previous decisions of this Court.

In the case of *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 499, 55 S. Ct. 313, 79 L. Ed. 583, this court quoted with approval the opinion of Judge Learned Hand, wherein Judge Hand said:

"We see no reason for a limited construction (of the United States Arbitration Act) and conclude that Section 3 (the section of the Act authorizing a stay of proceedings) authorizes a stay even though the arbitration

must take place beyond the jurisdiction of the court." (*Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 2nd Cir., 70 F. 2d 297)

That there is no jurisdictional conflict between the Arbitration Act and the Miller Act can also be demonstrated by the very language of the Arbitration Act. The Act does not provide that the federal court shall lose jurisdiction, but that the further exercise of such jurisdiction shall merely be stayed pending arbitration. Manifestly, therefore, a proper construction of the two Acts would appear to be that if the suit be brought within a district in which the contract was performed, as required by the provisons of the Miller Act, either party might move for a stay of the action in accordance with the provisions of the Arbitration Act, and the parties to the contract might then arbitrate in accordance with the contract entered into by both and at any place where both had agreed to so arbitrate, but finally and at last, the judgment of the arbitrators would be entered in proceedings in the original district court action.

Nothing held by this court in *Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, relied upon by petitioner, is contrary to this reasoning. In the *Bernhardt* case this court simply held that Section 3 of the Arbitration Act was applicable only to agreements for arbitration in maritime transactions and contracts evidencing transactions in commerce. In the *Bernhardt* case jurisdiction was not based upon a federal question but on the basis of diversity of citizenship, and this court held, therefore, that under the mandate of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the right to arbi-

trate would depend on local law rather than federal law, the parties not being engaged in commerce or maritime transactions.

In support of its motion, petitioner also cites two cases arising under the Federal Employers Liability Act (*Boyd* v. *Grand Trunk Western Railroad Company*, 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55; and *Pope* v. *Atlantic Coastline Railroad Company*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094) as authority for the proposition that the Miller Act contains certain jurisdictional provisions which can not be waived. It is respectfully pointed out that these cases are not authority for such proposition and are clearly distinguishable by the language of the Federal Employers Liability Act which contains an express "non-waiver" provision declaring void any "contract, rule, regulation or devise whatsoever, the intent or purpose of which shall be to enable any common carrier to exempt itself from any liability created by this Act." [3] Because of this specific non-waiver provision, this Court held in the *Grand Trunk Western Railroad Company* case, supra, that an agreement which had the effect of depriving a claimant of his rights under the Act was void; and in the *Atlantic Coastline Railroad Company* case, supra, that a Georgia court did not have the right to deprive a claimant resident of that state from maintaining a suit in a foreign state.

Equally distinguishable, and on the same basis, is the case of *Wilko* v. *Swan*, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168, cited by petitioner in support of the same proposition. In that case this court, in interpreting the Securities Act of 1933, held void a contract signed by

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[3] Federal Employers Liability Act, 45 USCA 55.

the customer of a securities house wherein he waived his right to sue for the reason that the Securities Act of 1933 declared void any "condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision"[4] of the Act.

The Miller Act contains no such provision.

3.

The decision of the Court of Appeals is in harmony with decisions of other Circuit Courts and no conflict exists.

Although petitioner says that the present case is in conflict with the decisions of other circuit courts, he cites no authority and, it is respectfully submitted, no conflict exists. On the contrary, other circuit courts have recognized the arbitrability of Miller Act cases.

In at least three Miller Act cases, *United States* v. *Bregman Construction Corporation*, 6th Cir., 256 F. 2d 851; *United States* v. *Al Con Development Corporation*, 4th Cir., 271 F. 2d 904; and *Agostini Bros. Building Corporation* v. *United States*, 4th Cir., 142 F. 2d 854, other circuit courts have indicated that arbitration is allowable in a Miller Act case. While admittedly these cases do not squarely raise the point, they are certainly physical precedents, and significantly enough in the *Bregman* case the court categorically held that "without question, in a proper situation, the Arbitration Act applies in proceedings under the Miller Act."

4.

A Miller Act case is peculiarly suited for arbitration.

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[4] Securities Act of 1933, 15 USCA 77n.

The Court of Appeals in its opinion in this case observed that if it could be shown that disputes arising under the Miller Act involved "complicated and sophisticated legal issues which can not readily be resolved by arbitrators untrained in the law," then perhaps some merit might be found in petitioner's argument that Miller Act suits are not subject to arbitration. It is interesting to note that this court in the case of *Wilko* v. *Swan*, supra, listed, as illustrating a situation peculiarly suited to arbitration, a case where "the amount of money due under a contract" was involved, and cited *Agostini Bros. Bldg. Corp.* v. *United States*, supra, a case decided by the Fourth Circuit wherein a Miller Act suit was arbitrated. The case at bar, as do virtually all Miller Act cases, turns primarily on "the amount of money due under a contract," and would therefore appear to be, as this court says, one peculiarly suited for arbitration.

5.

The contract in question evidences a transaction involving commerce.

The Court of Appeals held, and it is undisputed in the record, that "a New York corporation contracted with appellee, a Georgia corporation, to do the work within the State of Georgia; that appellant sent substantial supervisory personnel across the state lines, and received supplies and equipment across state lines. Working on the projects were subcontractors from states other than Georgia. Moreover, the facility involved is an integral part of a transcontinental system joined and holding hands with facilities already in commerce in other states and countries by radio and telephone communications, and further joined with numerous other military

bases already in commerce from almost the North Pole to Puerto Rico in a single giant network of air bases and communication facilities." (R. 210 Footnote 3)

Contrary to the argument advanced by petitioner, this court has rejected the theory that a war instrument is excluded from interstate commerce in the case of *Powell* v. *United States Cartridge Company*, 339 U. S. 497, 94 L. Ed. 1017. This court has also rejected the "new construction" doctrine and on at least two occasions has held that contracts involving work substantially identical to that in the case at bar involved interstate commerce. The two cases in point are *Mitchell* v. *Lublin, McGaughy & Associates, et al.*, 358 U. S. 207, 3 L. Ed. 2d 243, and *Mitchell* v. *C. W. Vollmer & Company*, 349 U. S. 427, 99 L. Ed. 1196.

In this connection see also the case of *Metro Industrial Painting Corp., et al.* v. *Terminal Construction Company, Inc.*, 2nd Cir., 287 F. 2d 382, involving facts almost identical to the case at bar; and see also the case of *Goldberg, et al.* v. *Five Boro Construction Corp.*, 291 F. 2d 371, wherein the First Circuit Court of Appeals in a case involving respondent, Electronic & Missile Facilities, Inc. (at a time when its name was Five Boro Construction Corporation) specifically held this very company to be in commerce while engaged on a project similar in every respect to the project involved under the contracts in the case at bar.

6.

Petitioner's contention that the contracts were subject to rescission is without merit.

It appears to us that if the foregoing issues do not

justify the grant of certiorari, as we contend, then certainly this court would not grant certiorari to review the simple legal question whether the contracts could be rescinded for fraud. However, since the issue is argued by opposing counsel, we would point out that petitioner completed his contract before insisting that he was entitled to rescind and that he had before him during the course of the work all facts which might give him a right to rescind. Whether this case be construed by the law of Georgia or whether it be construed by the federal law, the results are exactly the same. As held by the Court of Appeals, "under federal law arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision was fraudulently procured, *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 2nd Cir., 271 F. 2d 402."

On the other hand, if state law be controlling, then the principle is universal that where a right to rescind exists, the party entitled to rescind must act promptly, leaving no doubt as to his election to rescind, and adhere to the position taken. 3 *Williston* (Contracts), Section 688; 12 *Am. Jur.* 1029 (Contracts), Section 447; 12 *Am. Jur.* 1030 (Contracts), Section 449; *Pearson* v. *George*, 209 Ga. 938, 945 (77 S. E. 2d 1).

In either event no substantial federal issue is presented.

CONCLUSION

It is most respectfully insisted that the case at bar is in harmony with decisions of this court and of other circuit courts; that it has been correctly decided by the

Court of Appeals; and that certiorari should be denied.

Respectfully submitted,

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